

ORIGINAL COPY

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 7240 OF 2013

NAIROBI PACIFIC HOTEL LTD.....PLAINTIFF/APPLICANT

VERSUS

KENYA ASSOCIATION OF MUSIC PRODUCERS.....1ST DEFENDANT/RESPONDENT

PERFORMERS RIGHTS SOCIETY OF KENYA.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant's Notice of Motion application dated 19th November, 2013 and filed in court on the same day is brought under the provisions of Order 40 Rule 2 of the Civil Procedure Rules, Section 63(e) of the Civil Procedure Act (cap.21) and the Copyright Act, 2011 seeking for orders that;

1. This application be certified as urgent and be heard *ex parte* in the first instance.
2. An interim order be issued restraining the Defendants by themselves, their servants, agents representatives or otherwise however, from entering, demanding royalties or performance fees, harassing the Plaintiff and its workers and from disrupting the Plaintiff's business, and from continuance or repetition of the said nuisance or the committal of any nuisance of a like kind in respect of the Plaintiff's business known as Nairobi Pacific Hotel pending the inter parties

ORIGINAL COPY

hearing and determination of this application

3. An interim order be issued restraining the Defendants by themselves, their servants, agents representatives or otherwise however, from entering, demanding royalties or performance fees, harassing the Plaintiff and it's workers and from disrupting the Plaintiff's business, and from continuance or repetition of the said nuisance or the committal of any nuisance of a like kind in respect of the Plaintiff's business known as Nairobi Pacific Hotel pending the hearing and determination of this suit.
4. The Honourable Court be pleased to issue further orders as will be necessary to protect the Plaintiff from harassment by the Defendant.
5. The costs of this application be provided for.

The Application is based on the grounds on the face of the application and is further supported by the Affidavit of Josephat Mutwiri, the Accountant in charge of finances doubling as the Manager of the Applicant/Plaintiff sworn on the same date and whose contents I have read and the annexures thereto.

In response, the 2nd Defendant/Respondent filed a Replying Affidavit sworn by Angela Ndambuki, Chief Executive Officer of the 2nd Defendant on 29th November, 2013 and filed in court on the same date whose contents I have read together with the annexures thereto. The 1st Defendant never filed any reply.

ORIGINAL COPY

and that the license permits the holder to communicate to the public Musical Works contained therein as background music.

The Respondents on the other hand and specifically from the reading of the Replying Affidavit of Angela Ndambuki sworn on 29th November, 2013 and filed in court on the same day at paragraph 18 and 19, clearly states that the Performance License or *Public Performance License* (which the Applicant have) is a distinct licence from a *Communication to the Public Licence*. The former is issued by the Music Copyright Society of Kenya, for the protection of the rights of composers, authors, and publishers of musical works while the latter is issued by jointly by the 1st and 2nd Respondents for the protection and enforcement of the respective rights of performers and producers. That it was the *Communication to the Public Licence* that the 2nd Respondent's officers sought from the Applicant on 30th August, 2013 and which they have, on various dates prior to 30th August, 2013 implored the Applicant to obtain.

The 2nd Respondent thus insists that, the Applicant is required to obtain a *Communication to the Public Licence from the 1st and 2nd Respondents in addition to Public Performance License it had* obtained from the Music Copyright Society of Kenya.

That it is not correct that the Public Performance License that the Applicant had obtained from the Music Copyright Society of Kenya is sufficient for the protection of the rights of performers and producers subsisting in the sound recordings and audiovisual works used by the Applicant as the latter constitute distinct classes of rights stated hereinabove.

ORIGINAL COPY

Thereafter counsel for the counsel for the Applicant and 2nd Respondent filed written (rival) submissions which I have also read and considered together with the cited authorities.

The application principally prays for grant of a temporary injunction of a restraining nature.

The principles and/or the necessary ingredients for the grant of an interlocutory injunction whether it is of a restraining nature or compulsive or mandatory nature are well set out in the celebrated case of Giella vs Cassman Brown & Co. Ltd [1973] E.A 358 these are;

- a) The Applicant must establish or make out a prima facie case with a probability of success.
- b) Normally an injunction will not be granted unless it can be shown that the Applicant is likely to suffer irreparable injury which cannot be adequately compensated by an award of damages; and
- c) If the court is in doubt it should decide on a balance of convenience.

On Prima facie case, in Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, a prima facie case has been described in a civil application to include but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

Having looked carefully at the record I note that the Plaintiff/Applicant has a *Public Performance License* issued to them by the Music Copyright Society of Kenya which expires on 31st July, 2014

ORIGINAL COPY

Contrary to the Applicant's allegations, from the record, indeed the 2nd Respondent is a Collective Management Organization registered and licensed by the Kenya Copyright Board pursuant to the provisions of section 46(2) of the Copyright Act, 2001 (cap.130 Laws of Kenya) to collect licence fees from the users who broadcast or communicate sound recordings and audiovisual works to the public.

In Kenya Hotels Limited Vs. Kenya Commercial Bank Ltd & Another [2004]1 KLR 80, it is clear that an injunction is an equitable remedy, and the court while being guided by the three principles, must also look at all the circumstances including the conduct of the parties.

An interlocutory injunction would be granted sparingly and only in the exceptional circumstances such as where the Applicant's case is very strong and straight forward.

Despite being implored upon to obtain the relevant licence by the Respondent, that is, Communication to the Public Licence, the Applicant has declined to do so. An injunction is an equitable relief hence discretionary and equity insists that "he who comes to equity must come with clean hands".

I do not see clean hands on the part of the Applicant in moving the Honourable Court with the present applicant.

No prima facie case has been made out by the Applicant and the balance of convenience tilts in favour of the Respondents.

ORIGINAL COPY

Consequently, the Plaintiff/Applicant's Notice of Motion Application dated 19th November, 2013 is ill - advised and the same is dismissed with costs.

Dated, Delivered and Signed this 14th day of February, 2014


I. GICHOBII (MS.)

R.M.

In the presence of

Maina- court clerk

..... S. N. Nganga


For the Applicant

..... Kegei Wub Okuto

For the 1st Respondent

..... Mabere Wub for Malonza

For the 2nd Respondent


I. GICHOBII (MS.)

R.M.

14/2/2014